granted only where the movants' right to it is clear and free from doubt. C 124. Petitioner asked the court to allow him to amend his complaint. C 125. Petitioner requested the court to deny the City defendants' motion for summary judgment. C 125.

On September 15, 2002, the trial court heard the parties' arguments, with petitioner appearing *pro se* and the City defendants represented by counsel. The court took the case under advisement. C 12. On November 3, 2003, the trial court entered its order granting the City defendents' motion for summary judgment. C 81, C 127-131.

Petitioner's appellate counsel entered an appearance in the trial court and filed a motion to add the language necessary for an appeal pursuant to Supreme Court Rule 304(a), noting that the grant of summary judgment was as to fewer than all parties. C 135-138. By agreement, an order was entered adding the necessary language for this case to be brought as an appeal pursuant to Illinois Supreme Court Rule 304(a). C 147. On January 8, 2004, Petitioner filed a timely notice of appeal.

FEDERAL QUESTIONS

The federal questions which petitioner now seeks to have reviewed by the United States Supreme Court were raised by petitioner in the trial court, before the Fifth District Appellate Court, and also in his petition for leave to appeal to the Illinois Supreme Court.

In the trial court, petitioner, through his *pro se* response to the motion for summary judgment challenged the notification procedures required the vehicle owner to respond within seven days from the date the notice was mailed, but that the owner might not have received the certified mail within seven days. C 118. Petitioner further alleged that the Ordinance was unreasonable in that it allowed a notice to be served on the owner or some other person and that the City did not have to establish whether the notice was actually received if it was mailed. C 118.

On appeal to the Fifth District Illinois Appellate Court, petitioner argued in his appellant's brief that Marion City Ordinance No. 1759 is unconstitutional on its face because it is vague, contradictory, unreasonable, and overly broad. Petitioner's appellant's brief, pp. 23-35. See Appendix at pp. A-34 through A-47.

The Fifth District Illinois Appellate Court did not rule on petitioner's arguments that Ordinance 1759 is unconstitutional. Rather, the court ruled that "because the plaintiff did not raise this argument in the

trial court, the argument is waived," and declined to consider it. *Murray v. Butler, et al.*, Fifth District Illinois Appellate Court Rule 23 Order, p. 9; Appendix, p. A-15.

In his petition for leave to appeal to the Illinois Supreme Court, petitioner argued that the appellate court improperly refused to consider his argument that the Ordinance under which his automobiles were seized was unconstitutional because it is overly broad, contradictory, and an unreasonable exercise of the City's police power, See Petitioner's petition for leave to appeal to the Illinois Supreme Court at pp. 8-14; Appendix pp. A-51 through A-55. The Illinois Supreme Court denied the petition for leave to appeal without discussion or issuance of an opinion. Appendix, p. A-24.

ARGUMENT

I. THE FIFTH DISTRICT ILLINOIS APPELLATE COURT IMPROPERLY REFUSED TO CONSIDER PLAINTIFF'S ARGUMENT THAT THE ORDINANCE UNDER WHICH PLAINTIFF'S AUTOMOBILES WERE SEIZED IS UNCONSTITUTIONAL.

In its unpublished order affirming the trial court's grant of summary judgment in favor of the City defendants, the Fifth District Illinois Appellate Court refused to consider petitioner's argument that the Ordinance under which his vehicles were confiscated was unconstitutional on its face. Without any explanation, the appellate court found the argument to be waived and declined to consider it. Rule 23 Order, p. 9, Appendix, p. A-15.

The application of the waiver rule is particularly unjust under the circumstances of this case because petitioner raised the question of the constitutionality of Ordinance No. 1759 in the trial court, in his complaint (C 21) and again in his response to City defendants' motion for summary judgment. C 118. However, because petitioner's trial attorney was allowed to withdraw at the beginning of the case in the trial court (C 77), and because this case was summarily dismissed without any evidentiary hearing on petitioner's complaint and without allowing petitioner leave to amend his complaint, petitioner was not allowed to fully develop his constitutional arguments in the trial court.

Moreover, even if the constitutional issue was not raised in the trial court, the waiver rule is a limitation on the parties and not upon the

jurisdiction of the reviewing court. *Village of Lake Villa v. Stockovich*, 211 Ill. 2d 106, 119, 810 N.E.2nd 13, 22, 284 Ill. Dec. 360, 369 (2004). See also, *County of Montgomery v. Deer Creek, Inc.*, 294 Ill. App. 3d 851, 856, 691 N.E. 2d 185, 189, 229 Ill. Dec. 249, 253 (5th Dist. 1998) (Where he issue is one of law and is fully briefed and argued by the parties, the reviewing court may consider that issue although not raised in the trial court). The rule is the same in the United States Supreme Court. Where the lower courts have found it unnecessary to reach an issue, this Honorable Court often chooses to consider that issue when fully briefed and argued in order to bring the litigation to a close. Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 465-66, 88 S.Ct. 1140, 1145, 20 L.Ed.2nd 30, 36-37 (1968).

The question of the constitutionality of Ordinance No. 1759 is an issue of law. Stockovich, 211 Ill. 2d at 21-22 810 N.E.2d at 23, 284 Ill. Dec. at 370. The issue of the constitutionality of the Ordinance was fully briefed by both parties in the appellate court. As a result, the general rule of waiver should not have been applied by the Fifth District Illinois Appellate Court, and this Court should consider that issue as well.

Additionally, as a matter of judicial economy, the appellate court should have considered, and this Court should grant petitioner's petition for writ of certiorari and consider the merits of the constitutional argument due to the procedural posture of this case. Petitioner appealed the decision of the trial court pursuant to Illinois Supreme Court Rule 304(a) from a grant of summary judgment in favor of fewer than all parties. C 147-48. The remaining defendant, Tondini, filed a motion for summary judgment on January 15, 2004, which is virtually identical to the motion for summary judgment granted as to the City defendants. C 154. The motion for summary judgment filed by the remaining defendant is currently pending and undecided in the trial court. If this Court does not grant the petition for writ of certiorari and the appellate court's application of the waiver rule is allowed to stand, then the constitutional issue is likely to be raised again in the trial court.

Once that issue has been determined in the trial court, regardless of the trial court's ruling, the losing party will then have the right to appeal that decision to the appellate court. In order to avoid the cost and time involved with addressing the constitutional issue on remand to the trial court and again on appeal, the appellate court should have considered the merits of the constitutional issue raised in petitioner's briefs to the appellate court. See, Appellant's brief, pp. 22-35; Appellant's Reply brief, pp. 3-5; Appendix, pp. A-34 through A-47.

pp. 3-5; Appendix, pp. A-34 through A-47.

II. Marion City Ordinance No. 1759 is unconstitutional because it is overly broad, contradictory, and an unreasonable exercise of the City's police power.

Marion's City Ordinance No. 1759 seeks to regulate abandoned and derelict vehicles, *inter alia*, as safety hazards and public nuisances. C 101-02, Appendix, p. A-26. The City of Marion has declared that its policy is to prohibit the abandonment of vehicles and the retention of derelicts and to enforce such prohibition by law. C 102, Appendix, p. A-26. While its aim is certainly laudable, this lengthy Ordinance includes several inconsistencies that make its application unreasonably vague, arbitrary, contradictory, and an unreasonable exercise of police power.

The essence of the Ordinance is contained in its definitions sections. However, those definitions do not adequately define the parameters of the Ordinance, but rather, only serve to confuse the issue. C 101-02, C 108-09, Appendix, p. A-25. Given the numerous inconsistencies in Ordinance No. 1759, those concerned with its application cannot reasonably ascertain how it applies to varying circumstances. This level of uncertainty and the numerous internal contradictions render the Ordinance unconstitutionally vague. *City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67 (1999) (a law fails to provide due process if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits).

The test for whether Ordinance No. 1759 passes constitutional muster is the rational basis test. *Sherman-Reynolds, Inc. v. Mahin,* 47 Ill. 2d 323, 327, 265 N.E.2nd 640, 642 (1970). Specifically, the statute will be upheld if it "bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor discriminatory. *Stockovich,* 211 Ill. 2d at 122, 810 N.E.2d at 24, 284 Ill. Dec. at 371. The application of the rational basis test requires the court to consider (1) whether the public interest the statute is intended to serve is a legitimate interest, (2) whether the statute bears a rational relationship to that interest, and (3) whether the method chosen by the legislature to protect or further the interest is reasonable. *Stockovich,* 211 Ill. 2d at 125, 810 N.E.2d at 25, 284 Ill. Dec. at 373.

In the case at bar, petitioner concedes the first prong of the rational basis test; the public interest Ordinance No. 1759 is intended to serve is clearly legitimate. It is the second and third prongs that are problematic.

First, the overly broad and contradictory nature of the Ordinance fails to bear a rational relationship to the City's interests in abating nuisances and protecting public health and safety. It defies common sense and reasonableness for the City to prohibit one such as petitioner from allowing his own vehicle to remain in one spot on his property for seven days regardless of the condition of that vehicle unless the vehicle is inside "an enclosed building." C 101, Appendix, p. A-25. It is equally unreasonable to prevent Marion City real estate owners such as petitioner from having any motor vehicle that is inoperable or incapable of being driven or used, unless it is in an enclosed building, regardless of the length of time that vehicle has been disabled and regardless of whether that vehicle is licensed and titled. C 101, Appendix, p. A-25.

Second, the method the City of Marion chose to further its interest in abating vehicular nuisances is not reasonable. In particular, the application of the Ordinance to petitioner's vehicles is totally unreasonable. At the time petitioner's vehicles were towed, the doors were locked and the windows were shut. C 118. Those vehicles, regardless of their location or their condition, did not constitute a safety hazard or a public nuisance; were not detrimental to the health, safety, or welfare of the general public; did not harbor disease or provide a breeding place for vermin; did invite plundering, create fire hazards, or present physical dangers to children; did not produce scenic blight, degrade the environment, or adversely affect land values; and they most certainly did not require local governmental intervention in order to ensure their expeditious removal. C 101-02, Appendix, p. A-25.

Marion Ordinance NO. 1759 fails to provide adequate warning of what conduct is forbidden and sets forth a standard so indefinite that the police, the court, and all others concerned with the Ordinance's enforcement are free to react to nothing more than their own preferences when applying the ordinance. That is the essence of a statutory provision that is void for vagueness under the due process clause of the Fourteenth Amendment. *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Ordinance No. 1759 fails to give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden by that Ordinance and thereby encourages arbitrary and erratic enforcement and seizures of private property in violation of due process. See,

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.E.2d 110 (1972).

As applied in this case, Ordinance No. 1759 is an unreasonable exercise of police power. As written, Ordinance No. 1759 is far too broad to accomplish the City's legitimate purposes. There is nothing in the record to indicate that either of the vehicles owned by petitioner and located on his private property were in any way a hazard or endangering the public safety or health. Where a legislative enactment is applied without any evidence that the conduct sought to be regulated has occurred, that enactment is arbitrary and an unreasonable exercise of the police power of the State. *Fiske v. Kansas* 274 U.S. 380, 387, 47 S.Ct. 655, 665, 71 L.Ed. 1108, 1111 (1927). The City of Marion's seizure of petitioner's vehicles unwarrantably infringed upon his property rights in violation of the due process clause of the Fourteenth Amendment *Fiske,* 274 U.S. at 387, 47 S.Ct. at 665, 71 L.Ed.2d at 1111.

For all of these reasons, the statutory framework chosen by the Marion City Council is not reasonable and is not rationally related to its stated public policy. Therefore, this Honorable Court should hold Marion City Ordinance No. 1759 unconstitutional and reverse the trial court's entry of summary judgment in favor of the City defendants.

CONCLUSION

When this Honorable Court considers this Petition for Writ of Certiorari, petitioner prays that the circumstances of how this case arrived will not be forgotten. An elderly gentleman's antique vehicles were confiscated under a City Ordinance that was purportedly intended to regulate abandoned and derelict vehicles. The Ordinance supposedly authorizing the seizure of petitioner's vehicles is extremely unclear and internally inconsistent. Certainly, anyone reading Ordinance No. 1759 in its entirety will inevitably conclude that it is virtually incomprehensible. It is a travesty of the law to allow this Ordinance, as written, to be applied at all, much less to petitioner's antique vehicles. Both the appellate and supreme courts of Illinois have improperly decided an important question of federal law that should be settled by this Honorable Court. United States Supreme Court Rule 10(c).

For all of the foregoing reasons, plaintiff-petitioner George Murray respectfully prays that his Petition for Writ to Certiorari be allowed.

Respectfully submitted,

GEORGE MURRAY, *Pro Se*

I verify under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 2005

GEORGE MURRAY

GEORGE MURRAY
P. O. Box 341
DuQuoin, IL 62832
(618) 318-1688

APPENDIX

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**IN THE CIRCUIT COURT FOR
THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS**

No. 2002-L-90

GEORGE MURRAY,

Plaintiff,

v.

ROBERT BUTLER, sued indivi-dually and as Mayor of Marion, Illinois; the CITY OF MARION, ILLINOIS; GENE GOOLSBY, sued individually and as Chief of Police designate; TONDINI WRECKER AND TOWING SERVICE.

November 3, 2003

Defendants.

ORDER

Before the Court is a motion for summary judgment filed by defendants Robert Butler, sued individually and as Mayor of Marion; the City of Marion, Illinois; and Gene Goolsby, sued individually and erroneously. A hearing on the motion was held September 15, 2003 with arguments being presented by counsel for the aforesaid defendants and the plaintiff who appeared pro se.

The City of Marion enacted Ordinance No. 1759 on March 27, 2000, making it unlawful to leave abandoned or derelict vehicles in the City. The Ordinance provided a procedure for the towing and disposition of such vehicles. It is undisputed that plaintiff left tow vehicles, a 1963 AMC Rambler and a 1964 Dodge Dart on a lot at the intersection fo Court and Chestnut Streets in Marion, which were towed by another defendant, Tondini Wrecker and Towing Service, at the City's request on June 11, 2001. In this suit, plaintiff has asserted three Counts. Counts I alleges a conversation of the vehicles which plaintiff characterizes as "antique

collectible cars." In Count II, plaintiff alleges the defendants failed to comply with the procedures outlined in Ordinance No. 1759 and deprived him of an opportunity to redeem the vehicles and prevent their loss. In Count III, plaintiff alleges state and federal violations of due process in that the vehicles were impounded allegedly without notice or an opportunity to be heard as was provided for in the ordinance. The summary judgment motion was supported by the affidavit of Sgt. Gene Goolsby of the Marion Police Department outlining the procedures he followed under Ordinance No. 1759 which led to the impoundment of plaintiff's vehicles. That affidavit also establishes compliance with the Ordinance, and that plaintiff has made no effort to claim the vehicles which remain in storage. Plaintiff filed a brief opposing the motion.

Summary judgment is proper if the pleadings, depositions, and admissions on file together with affidavits, if any, show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. (*Loyola Academy v. S & S Roof Maintenance, Inc.* (1992), 146 Ill.2d 263, 166 Ill.Dec. 882, 586 N.E.2d 1211; *Burton v. County of Jackson* (5th Dist. 1993), 246 Ill.App.d 677, 186 Ill.Dec. 472, 474, 616 N.E.2d 662, 664.) Formerly it was said that a mere scintilla of evidence was sufficient to raise a genuine issue of material fact in order to defeat summary judgment. That, however, is no longer true. (*Benner v. Bell* (4th Dist. 1992), 236 Ill.App.3d 761, 177 Ill.Dec. 1, 6, 602 N.E.2d 896, 901.)Instead, plaintiff must present a factual basis that would arguably entitle him to judgment. (Id; *Brooks v. Brennan* (5th Dist. 1994), 255 Ill.App.3d 260, 193 Ill.Dec. 67,68, 625 N.E.2d 1188, 1189.)

The Court finds there is no genuine issue of material fact and that the movants are entitled to judgment as a matter of law.

Ordinance No. 1759 is consistent with the provisions of Chapter 4 of the Illinois Vehicle Code (625 ILCS 5/4-101, et seq.). The movants are immune from the liability alleged in Counts I, II, III, and Iv of the plaintiff's complaint on the basis of §4-213(a) of the Vehicle Code (625 ILCS 5/4-213(a)) which provides that these defendants shall not be held to answer or be liable for damages brought by the registered owner, former registered owner, or his legal representative, a lien holder or any other person legally entitled to possession of the vehicle which is impounded and processed in the manner provided for in the Vehicle Code. The City's Ordinance is consistent with the procedures outlined in

Chapter 4 of the Vehicle Code.

Plaintiff cannot claim he has been deprived of either procedural or substantive due process as he alleges in Count III. Due process is not violated when a governmental representative allegedly deprives an individual of property, provided that an adequate post-deprivation remedy is provided under state or local law as is the case here under both Chapter 4 of the Vehicle Code (625 ILCS 5/4-101 et seq.) and Ordinance No. 1759. (See *Lee v. City of Chicago* (7th Cir. 2003), 330 F.3d 456; *Gable v. City of Chicago* (7th Cir. 2002), 296 F.3d 531, 539-41.)

Plaintiff's claim for punitive damages as is sought in Count IV is barred by §§ 2-102 and 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-102, 10/2-213).

Movants are also immune from the liability alleged in Counts I, II, III, and IV on the basis of several other provisions of the Local Governmental and Governmental Employees Tort Immunity Act. Under §2-103 (745 ILCS 10/2-103), the City of Marion cannot be liable for injury or damage caused by it adoption of Ordinance No. 1759 or by an alleged failure to enforce Ordinance No. 1759, or the provisions of Chapter 4 of the Vehicle Code. Under § 2-106 (745 ILCS 10/2-106), the City is not liable for injury or damage caused by a misrepresentation of its employee whether the employee is not liable. Under § 2-201 (745 ILCS 10/2-201), neither Mayor Butler nor Sgt. Goolsby are liable for injury or damage resulting from their acts or omissions in determining policy when acting in the exercise of such discretion even though abused. Under § 2-202 (745 10/2-202), neither Mayor Butler nor Sgt. Goolsby may be liable for their acts or omissions in the execution or enforcement of any law, unless such act or omission constitutes willful and wanton conduct. Under § 2-208 (745 ILCS 10/2-208), neither Mayor Butler nor Sgt. Goolsby may be liable for injury or damage caused by their institution or prosecution of any judicial or administrative proceeding within the scope of their employment unless they act maliciously and without probable cause. Under § 2-210 (745 ILCS 10/2-210), neither Mayor Butler nor Sgt. Goolsby may be liable for injury or damage caused by negligent misrepresentation or provision of information either orally, in writing, by computer, or any other electronic transmission, or in a book or other form of library material.

The aforesaid immunity provisions control here where plaintiff argues that the seizure of his vehicles was not done in compliance with the

City's Ordinance. Sgt. Goolsby's unopposed affidavit, however, undermines plaintiff's argument. His affidavit establishes that on September 25, 2000, he received a complaint tall grass and derelict vehicles on the vacant lot at Chestnut and Court Streets. He verified that the two vehicles on that lot were not licensed, had flat tires, and were full of material that appeared to be "junk." The following day he spoke with the plaintiff at the lot and verbally requested that the vehicles be moved and the weeds cut. He also offered to mail plaintiff a copy of Ordinance No. 1759, but plaintiff declined to give him an address. Instead, Sgt. Goolsby ran a motor vehicle check with the Illinois Secretary of State's office and identified the last known address of plaintiff from the Secretary of State's records as P. O. Box 341, DuQuoin, Illinois. On September 28, 2000, Sgt. Goolsby sent plaintiff a first-class mail letter notifying him of the Ordinance and advising him of the Ordinance and advising him that he had to respond within seven days. However, no response was received from the plaintiff.

Thereafter, on December 6, 2000, Sgt. Goolsby mailed plaintiff a certified mail letter requesting that the vehicles be moved and advising plaintiff of the consequences which would follow under the Ordinance if the request was ignored. That unopened, certified mail letter was returned undelivered on January 2, 2001. On May 18, 2001, Sgt Goolsby mailed a second certified mail letter with another request to remove the vehicles. It also was returned undelivered and unopened on June 4, 2001.

Finally, on June 11, 2001, acting on the authority of Ordinance No. 1759, Sgt. Goolsby requested that the vehicles be towed from the lot. Attached to his affidavit are copies of photographs of the vehicles and copies of the notices. Sgt. Goolsby forwarded to the plaintiff, along with a copy of Ordinance No. 1759. It is the finding of this Court that the two vehicles are derelict and inoperable vehicles falling within the description set forth in Ordinance No. 1759, that plaintiff was given the notice required by the Ordinance and by Illinois law before the vehicles were towed, and that there has been full compliance with the procedures required by the Ordinance for towing of the vehicles. Under these circumstances, there has been no violation of plaintiff's due process rights. (See *Lee v. City of Chicago* (7th Cir. 2003), 330 F3d 456; *Gable v. City of Chicago* (7th Cir. 2002), 296 F.3d 531, 539-41.)

It is therefore ordered on the authority of §2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005), that summary judgment is hereby granted in favor of defendants Robert Butler, sued individually and as Mayor of Marion; the City of Marion, Illinois; and Gene Goolsby, sued individually and erroneously as Chief of Police designate, on Counts I, II, III, and IV of plaintiff's complaint.

IT IS SO ORDERED.

DATED: 10/23/03

WILLIAM H. WILSON, JR., JUDGE

**IN THE CIRCUIT COURT FOR
THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS**

No. 2002-L-90

GEORGE MURRAY,

Plaintiff,

v.

ROBERT BUTLER, individually and as Mayor of Marion, Illinois; MARION, ILLINOIS; a Governmental Entity; GENE GOOLSBY, individually and as Chief of Police designate for the City of Marion, Illinois; TONDINI WRECKER AND TOWING SERVICE,

Defendants. December 16,2003

ORDER ADDING LANGUAGE TO NOVEMBER 3, 2003, ORDER PURSUANT TO SUPREME COURT RULE 304(a)

This Court has considered Plaintiff's motion to add language necessary for appeal pursuant to Supreme Court Rule 304(a) and hereby is GRANTED.

THEREFORE, it is the order of this Court that there is no just reason to delay enforcement or appeal of this cause and the order entered herein on November 3, 2003 is final and appealable pursuant to Supreme Court Rule 304(a).

IT IS SO ORDERED.

Date: 12/16/03

Enter: William H. Wilson, Jr.
Judge

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 2002-L-90

GEORGE MURRAY,

Plaintiff-Appellant,

v.

ROBERT BUTLER, individually and as Mayor of Marion, Illinois, THE CITY OF MARION, ILLINOIS, and GENE GOOLSBY, Individually and as Chief of Police Designate for the City of Marion, Illinois,

Defendants-Appellees,

and

TONDINI WRECKER AND TOWING SERVICE,

Defendant.

Appeal from the Circuit Court of Williamson County.

March 21, 2005

Honorable William H. Wilson, Judge, presiding.

RULE 23 ORDER

The plaintiff, George Murray, appeals, pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)), from the order of the circuit court of Williamson County granting a summeray judgment in favor of the defendants-Robert Butler, individually and as the mayor of Marion, Illinois; the City of Marion, Illinois, a governmental entity; and Gene Goolsby, individually and as the Chief of police designate for the City of Marion, Illinois (collectively referred to herein as the City defendants). The plaintiff sued for damages resulting from the towing of two of his vehicles pursuant to Marion City Ordinance No. 1759, entitled "Abandoned and Derelict Vehicles" (the Ordinance) (Marion, Ill., Ordinance No. 1759(eff. March 27, 2000)). On appeal, the plaintiff argues that the Ordinance is unconstitutional on its face because it is vague, contradictory, unreasonable, and overly broad, that the circuit court erred as a matter of law in finding that the Ordinance applied to him, and that the circuit court abused its discretion in denying his motion for leave to amend his complaint. We affirm.

BACKGROUND

On June 3, 2002, the plaintiff, through counsel, filed a verified complaint against the City defendants and defendant Tondini Wrecker & Towing Service (Tondini). In the complaint, the plaintiff alleged that on or about June 11, 2001, he owned two motor vehicles, a 1964 Dodge and a 1963 American Motors Rambler, both of which were located on a lot he owned in Marion. The plaintiff alleged that the vehicles were "antique collectible cars although not operating on the day in question."

The plaintiff alleged that Butler, while acting on behalf of the City of Marion in his capacity as the mayor of Marion, required Goolsby, who was acting within the scope of his employment as the chief of police designate for the City of Marion, to cause the removal of the vehicles from the plaintiff's lot without his consent or knowledge. The plaintiff further alleged that, at Goolsby's request and while acting within the scope of its authority granted by the City of Marion, Tondini removed the vehicles from the plaintiff's lot without his knowledge.

In count I, the plaintiff allleged that since June 11, 2001, the defendants held his vehicles without his permission and consent and refused to return the vehicles to him. In count II, the plaintiff alleged that the City of Marion acted under the Ordinance in causing his vehicles to be towed, that the Ordinance required notice to the vehicle owner by United States mail, that the defendants towed his vehicles without providing the notice required by the Ordinance, and that the defendants' failure to adhere to the ordinance deprived him of an opportunity to redeem his vehicles and prevent their loss. In count III, the plaintiff alleged that the defendants deprived him of his property without notice and without a hearing in violation of the due process clauses of the constitutions of the United States and the State of Illinois. Finally, in count IV, the plaintiff alleged that Butler and Goolsby acted with malice aforethought and with full knowledge of the contents of the Ordinance, that their actions were "not ministerial acts," and that their failure to obey the Ordinance constituted "willful and wanton negligence" and caused him to lose his property. In counts I, II, and III, the plaintiff sought monetary damages, and in count IV, he sought punitive damages.

Each defendant filed a response to the complaint and a jury demand. The City defendants subsequently filed a motion for leave to file affirmative defenses, which the circuit court granted.

In their affirmative defenses, the City defendants claimed immunity under section 4-213(a) of the Illinois Vehicle Code (the Vehicle Code) (625 ILCS 5/4-213(a) (West 2002)) and under several sections of the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10.1-101 *et seq.* (West 2002)). They also claimed that the plaintiff's due process rights were not violated because he was provided an adequate postdeprivation remedy under the Vehicle Code and the Ordinance. Finally, they claimed that the plaintiff failed to mitigate his damages.

The plaintiff's attorney subsequently filed a motion to withdraw as counsel, which the circuit court granted. The plaintiff *pro se.*

The City defendants then filed a motion for a summary judgment, arguing that the Ordinance made it unlawful to leave abandoned or derelict vehicles in the City of Marion and that the Ordinance provided a procedure for the towing and disposition of those vehicles. The City defendants acknowledged that the plaintiff "left two automobiles, a 1963 AMC Rambler and a 1964 Dodge Dart, on a lot at the intersection of Court and Chestnut Streets in Marion, which were towed by Tondini [] at the [C]ity's request on June 11, 2001."

In the motion, the City defendants argued that Goolsby's affidavit, which was attached to the motion, established that they complied with the Ordinance and that the plaintiff made no effort to claim the vehicles, which remained in storage. According to Goolsby's affidavit, he is a sergeant in the Marion police department. On September 25, 2000, he received a complaint concerning tall grass and derelict vehicles on a vacant lot at Chestnut and Court Streets in Marion. He verified that the two vehicles were not licensed, had flat tires, and were full of material that appeared to be "junk." On September 26, 2000, he spoke with the plaintiff at the lot and verbally requested that the plaintiff remove the vehicles and cut the tall weeds. He offered to mail the plaintiff a copy of the Ordinance, but the plaintiff refused to give him an address. He then ran a motor vehicle check with the Illinois Secretary of State, which indicated that the plaintiff's last known address was P. O. box 341, DuQuoin, Illinois.

According to his affidavit, on September 28, 2000, Goolsby sent the plaintiff a first class letter notifying him of the Ordinance, but he did not receive any response from the plaintiff. On December 6, 2000, he mailed the plaintiff a certified letter requesting that the plaintiff move the

vehicles and advising the plaintiff of the consequences if this request was ignored, but on January 2, 2001, he mailed the plaintiff a second certified letter was returned undelivered. On May 18, 2001, he mailed the plaintiff a second certified letter with another request to remove the vehicles, but again on June 4, 2001, the unopened, certified letter was returned undelivered. On June 11, 2001, acting on the authority of the Ordinance, Goolsby submitted a request to tow the two vehicles from the lot. The vehicles continue to be stored at Tondini, and the plaintiff has not sought to reclaim the vehicles from the storage facility by paying the towing and storage charges.

Attached to Goolsby's affidavit as exhibits were a copy of the "City of Marion Property Maintenance Complaint Form" concerning the vehicles, which indicated that the complainant was "Comm. Stewart"; a copy of the information obtained from the search of the Secretary of State, which indicated that the plaintiff's last known address was P.O. Box 341, DuQuoin, Illinois; copies of the notices Goolsby mailed to the plaintiff; certified mail receipts, which indicated that the letters were returned to sender as "[u]nclaimed;" the "Marion Police Department Vehicle Tow Record" for each vehicle, which indicated that the vehicles had been towed because they were " [a]bandoned;" pictures of the vehicles; and a copy of the Ordinance.

The plaintiff filed a *pro se* response to the City defendants' motion for a summary judgment. In his response, he denied each of the defendants' affirmative defenses. He also challenged Goolsby's affidavit on the basis that the complainant was James Stewart, a police commissioner, who lived approximately 150 yards from the plaintiff's lot. According to the plaintiff's response, Stewart was motivated by bias and prejudice against him and had exercised undue influence over Goolsby.

In his response, the plaintiff questioned Goolsby's determination that the vehicles were derelict. He also challenged Goolsby's statement that the vehicles were not licensed, stating that "the 1964 Dodge was licensed with currant [*sic*] tags at the time" but that the tags were kept off of the vehicle to prevent their theft. As to the 1963 Rambler, he alleged that he "was having trouble with a lost or misplaced title," which caused "an extended delay in getting the matter resolved."

In his response, the plaintiff also challenged Goolsby's statement that the vehicles were full of "junk" stating that Goolsby could not have seen the contents of the vehicles because the doors and trunks were locked.

The plaintiff claimed that the vehicles contained "furniture, auto parts, tools, clothing, and other valuable property" belonging to him.

In his response, the plaintiff denied that Goolsby's offered to mail him a copy of the Ordinance and stated that he had to get a copy by other means. The plaintiff argued that if Goolsby sent him a letter by first class mail notifying him of the Ordinance on September 28, 2000, as Goolsby claimed, Goolsby acted in contravention of the Ordinance, which requires notice by certified mail. The plaintiff suggested that Goolsby might have mailed the letter to the wrong address because two addresses are shown on the property maintenance complaint form.

In his response, the plaintiff challenged the Ordinance's notification procedures as unreasonable and vague in that the Ordinance required the vehicle owner to respond within seven days from the date the notice was mailed. The plaintiff argued that this requirement was unreasonalbe because the owner might not have received the certified mail within seven days. The plaintiff further argued that the Ordinance was unreasonable in that the City of Marion did not have to establish whether the vehicle owner actually received notice as long as it was mailed. The plaintiff noted that Goolsby sent the notices by certified mail, return receipt requested, but had no receipt signed by him showing that he received the notices. The plaintiff argued that his property was taken without legal notice.

In his response, the plaintiff also denied Goolsby's statement that he had not owe Tondini any charges because his private property had been illegally taken and withheld from him improperly for two years and taht he had been greatly damaged. He stated that the day after his vehicles were towed, he went to Tondini's during business hours and demanded his vehicles, but his demands were refused. He contacted the City of Marion attorney's office the same day and sought the possession of his property, but to no avail. He repeatedly indicated to the defendants that he wanted his property returned. But the defendants denied his requests. The plaintiff stated that a relative of Tondini's was a member of the Marion police department.

In his response, the plaintiff argued that he had not violated the Vehicle Code because his vehicles were not abandoned or derelict and because they were located on his private property. He also argued that because his vehicles "were over 25 years of age, were historical vehicles, [and] were antiques collectable cars," they fell within the exception

contained in section 1(A) of the Ordinance (Marion, Ill., Ordinance No. 1759,§ 1 (A) (eff. March 27, 2000)). He argued that the immunity provisions cited by the City defendants in their affirmative defenses and in their motion for a summary judgment were irrelevant to the City of Marion's act of towing his vehicles from his private property. He also argued that the immunity provision of the Vehicle Code (625 ILCS 5/4-213 (West 2002)) was inapplicable to the City of Marion because it did not have more than 500,000 inhabitants (see 625 ILCS 5/4-212.1 (West 2002)).

In his response, the plaintiff also stated that Goolsby came upon this property as a trespasser, without his authority or permission, and removed and destroyed a for-sale sign to prevent potential buyers from knowing that his property was for sale. The plaintiff stated:

> "That Goolsby, apparently at the instance of Defendant Butler, said and stated to the plaintiff that he should contact the adjoining landowner, one Glen Clarida, for the purpose of selling his lot to Clarida, and employee of the City of Marion [] and a close personal friend[] and/or relative [of] Defendant Butler.
>
> These are the facts showing malice and wanton and wilful acts of the defendants[,] facts to be reviewed by a jury."

In his response, the plaintiff argued that the defendants acted with malice, that their conduct was willful and wanton, and that the case involved "a web and welter of wrongful, illegal, and unlawful acts of the defendants." He argued that the case posed many questions of fact, which should be determined by a jury.

In his response, the plaintiff also requested that the court allow him to amend his complaint because his withdrawn attorney had alleged in the complaint that the acts of Butler and Goolsby were not ministerial acts but that the plaintiff, pro se, in researching the matter, had found that the defendants' actions were ministerial because they were merely enforcing the Ordinance. The plaintiff did not tender or file an amended complaint.

Following a hearing on the City defendants' motion for a summary judgment, the court took the matter under advisement. On November 3, 2003. the trial court entered its order granting the City defendants' motion for a summary judgment.

In ruling on the motion for a summary judgment, the court found the plaintiff's vehicles were derelict and inoperable within the definition

set forth in the Ordinance, that the plaintiff had been given the notice required by the Ordinance and by Illinois law before the vehicles were towed, and that the City of Marion had fully complied with the procedures required by the Ordinance. The court also found that the plaintiff's due process rights were not violated because he was provided an adequate postdeprivation remedy under both chapter 4 of the Vehicle Code (625 ILCS 5/4-101 *et seq.* (West 2002)) and the Ordinance. Finally, the court found that, based on section 4-213(a) of the Vehicle Code (625 ILCS 5/4-213(a) (West 2002)) and numerous provisions of the Tort Immunity Act (745 ILCS 10/2-101 *et seq.* (West 2002)), the City defendants were immune from the liability alleged in the complaint. In ruling on the motion, the court did not address the plaintiff's request to amend his complaint to allege that the acts of Butler and Goolsby were ministerial acts.

After the circuit court entered its order granting a summary judgment, an attorney entered her appearance on behalf of the plaintiff and filed a motion to add the language necessary for an appeal pursuant to Supreme Court Rule 304(a), noting that the grant of a summary judgment involved fewer than all the parties. On December 16, 2003, the court entered an order adding the language necessary for an appeal of the summary judgment pursuant to Supreme Court Rule 304(a). The plaintiff filed a timely notice of appeal.

ANALYSIS

The plaintiff's first argument is that the Ordinance is unconstitutional on its face because it is vague, contradictory, unreasonable, and overly broad regarding what constitutes an abandoned or derelict vehicle. The City defendants argue that the plaintiff waived this argument by failing to raise it in the trial court. While the plaintiff acknowledges that he did not raise the argument in the trial court, he argues that this court may consider the argument because it is a question of law that was full briefed and argued by the parties.

Because the plaintiff did not raise this argument in the trial court, the argument is waived, and we decline to consider it. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 344 (2002) ("Questions not raised in the trial court cannot be argued for the first time on appeal" (quoting *Ragan v.* Columbia Mutual Insurance Co., 183 Ill. 2d 342, 355 (1998))); *In re Marriage of T.H.*, 255 Ill. App. 3d 247, 254 (1993) ("It is well settled tht issues not raised in the trial court are waived and may not be raised for the first time on appeal [citation], and this rule applies to constitutional as

well as to nonconstitutional issues").

The plaintiff next argues that the trial court erred as a matter of law in finding that the Ordinance applied to his vehicles, which were more than 25 years old. The City defendants argue that the plaintiff waived the argument that the Ordinance did not apply to his vehicles because he did not plead the allegation in his complaint. We disagree.

In his complaint, the plaintiff alleged that he owned two motor vehicles, a 1964 Dodge Dart and a 1963 American Motors vehicle, both of which were "antique collectible cars although not operating on the day in questions." In their motion for a summary judgment, the City defendants argued that the Ordinance applied to the plaintiff's vehicles. In his response to the City defendants' motion for a summary judgment, the plaintiff argued that his vehicles were more than 25 years old, were historical vehicles, were antique collectible cars, and were subject to the exception for historic vehicles contained in paragraph (A) of section 1 of the Ordinance. Accordingly, the plaintiff did not waive his argument that the Ordinance did not apply to his vehicles.

The interpretation of legislation is a question of law, which we review *de novo.* See *In re Marriage of Rogers,* 213 Ill. 2d 129, 135-36 (2004). The best evidence of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning. *Eden Retirement Center, Inc. v. Department fo Revenue,* 213 Ill. 2d 273, 291 (2004). The statute must be evaluated as a whole, with each provision construed in connection with every other provision. *Eden Retirement Center, Inc.,* 213 Ill. 2d at 291.

"If the language of the statute is clear and unambiguous, there is no need to resort to other aids of construction." *People ex rel. Department* of Public Aid v. Smith, 212 Ill. 2d 389, 397 (2004). However, if the language of the statute is ambiguous, we may look to other sources to determine legislative intent. *Zaabel v. Koneiski,* 209 Ill. 2d 127, 133 (2004). "A statute is ambiguous if it is capable of more than one reasonable interpretation." *Smith,* 212 Ill. 2d at 397.

Turning to the language of the Ordinance, section 1, the definitions section, provides, in pertinent part:

> " 'Abandoned vehicle' means any motor vehicle*** which is in a state of disrepair, partially dismantled, wrecked, or otherwise inoperable so as to render the vehicle incapable of being driven or used in its condition; or any motor vehicle***

which has not been moved or used for seven (7) consecutive days or more and is apparently deserted. The term 'abandoned vehicle' *** shall not be construed to include for the purposes of this ordinance, any such vehicle *** which is kept *** in an appropropriate storage place or depository maintained in a lawful place and manner by the City or other party.

'Derelict vehicle' means any inoperable, currently unregistered, discarded motor vehicle, regardless of title, having lost its character as a substantial property or left unattended without justification contrary to the public policy expressed in this ordinance. 'Inoperable' means any motor vehicle from which, for a period of seven (7) days, the engine, wheels, or other parts have been removed, or on which the engine, wheels, or other parts have been altered, damaged[,] or otherwise so treated that the vehicle is incapable of being driven under its own motor power.

(A) Exceptions: *** Nothing in this Section shall apply to any motor vehicle that is kept within a building when not in use, to operate [*sic*] historic vehicles over twenty-five (25) years of age or to a motor vehicle on the premises of a place of business engaged in wrecking or junking of motor vehicles. (Emphasis in original.) Marion, Ill., Ordinance No. 1759,§1 (eff. March 27, 2000).

The plaintiff argues that the Ordinance does not apply to his vehicles because they fall within the exception for "historic vehicles over twenty-five (25) years of age." The language of the exception is not clear and unambiguous. It is apparent that the exception contains a scrivener's error, but it is not readily apparent what that error is. The exception is ambiguous, and we must look beyond the language of the Ordinance to determine the intent of the drafters. See *Zaabel*, 209 Ill. 2d at 133-34.

If the word "operate" were removed from the sentence (which is, in essence, what the plaintiff would have us do), the pertinent part of the exception would read: "Nothing in this Section shall apply *** to historic vehicles over twenty-five (25) years of age ***." With that change, the exception would be clear, the plaintiff's vehicles would fall within the exception, and the Ordinance would not apply to the plaintiff's vehicles. However, that construction would render the word "operate" meaningless and superfluous. If possible, we must construe the Ordinance so that each

word, clause, and sentence is given a reasonable meaning and not rendered superfluous. See *People v. Botruff*, 212 Ill. 2d 166, 175 (2004).

In addition, that construction would make it so that no vehicle more than 25 years of age could ever be covered by the Ordinance because it would always fall within the exception. In determining the intent of the drafters, we may properly consider not only the language of the legislation but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved. *Botruff*, 212 Ill. 2d at 175. We may also consider the consequences that would result from construing the legislation one way or the other. *Williams v. Staples*, 208 Ill. 2d 486, 487 (2004). In construing the legislation, we will presume that the drafters did not intend an absurd, inconvenient, or unjust result. *Botruff*, 212 Ill. 2d at 175. Legislation must be construed in the most beneficial way their language will allow to prevent hardship or injustice and to oppose prejudice to public interests. *Botruff*, 212 Ill. 2d at 175.

Section 2 of the Ordinance provides:

> "Public policy --- The city council finds that abandoned and derelict vehicles constitute a safety hazard and a public nuisance; are detrimental to the health, safety[,] and welfare of the general public by harboring disease, providing breeding places for vermin, inviting plundering, creating fire hazards, and presenting physical dangers to children and others; produces scenic blights which degrade the environment and adversely affect land values and the proper maintenance and continuing development of the City; represent a resource out of place and an energy loss to the economy, and require local governmental attention in order to assure the expeditious removal of these abandoned and derelict vehicles.
>
> The Marion City Council declares, therefore, that it is the policy of the City to prohibit the abandonment of vehicles and the retention of derelicts and to enforce such prohibition by law. Marion, Ill., Ordinance No. 179,§2 (eff. March 27, 2000).

We find that construing the exception so that no vehicle more than 25 years of age could ever be covered by the Ordinance would be contrary to the public policy as stated in section 2 of the Ordinance, and we presume that the city council did not intend such an absurd result. See *Botruff*, 212 Ill. 2d at 175.

If the word "operate" were changed to "operable," the pertinent

part of the exception would read: "Nothing in this Section shall apply *** to operable historic vehicles over twenty-five (25) years of age ***." With that change, the exception would be clear, the plaintiff's vehicles would not fall within the exception, and the Ordinance would apply to the plaintiff's vehicles.

"We presume that the legislature intends that two or more statutes which relate to the same subject are to be read harmoniously, so that no provisions are rendered inoperative." *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 555 (2004). "Statutes relating to the same subject must be compared and construed with reference to each other so that effect may be given to all of the provisions to the extent possible, even where an apparent conflict exists." *Flynn*, 211 Ill. 2d at 555.

Section 11-40-3 of the Illinois Municipal Code (the Municipal Code) (65 ILCS 5/11-40-3 (West 2002)) provides, in pertinent part:

> "[T]he corporate authorities of each municipality may by ordinance declare all inoperable motor vehicles, whether on public, to be a nuisance and authorize fines to be levied for the failure of any person to obey a notice received from the municipality which states that such person is to dispose of any inoperable motor vehicles under his control, and may authorize a law enforcement agency, with applicable jurisdiction, to remove 7 days from the issuance of the municipal notice, any inoperable motor vehicle or parts thereof. *However, nothing in this Section shall apply to any motor vehicle that is kept within a building when not in use, to operable historic vehicles over 25 years of age, or to a motor vehicle on the premises of a place of business engaged in the wrecking or junking of motor vehicles.*" (Emphasis added.)

The Marion City Council passed the Ordinance on March 27, 2000. We find the wording of section 11-40-3 of the Municipal Code to be persuasive evidence of the intent of the drafters of the Ordinance. Because the language contained in the exception in section 1(A) of the Ordinance tracks the language contained in section 11-40-3 of the Municipal Code with the exception of the one word "operate," which renders the exception in the Ordinance unclear and ambiguous, we find that the drafters of the Ordinance intended the word "operate" to be "operable" and the word "operate" was merely a typographical or scrivener's error. See *People v. Garrison*, 82 Ill. 2d 444, 455 (1980) (holding that, when

necessary to effectuate the intent of the legislature, a court may alter, supply, or modify words to correct obvious mistakes). Thus, we find that the exception was for "operable historic vehicles over twenty-five (25) years of age," that the plaintiff's vehicles, which were inoperable, did not fall within the exception, and that the trial court properly found that the Ordinance applied to the plaintiff's vehicles.

The plaintiff's next argument is that the trial court erred in granting a summary judgment in favor of the City defendants because in his response to the motion, he raised numerous questions of fact. A summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2002). *Home Insurance Co. v.* Cincinnati Insurance Co., 213 Ill. 2d 307, 315 (2004). "The standard of review for the entry of summary judgment is de novo." *Home Insurance Co.*, 213 Ill. 2d at 315.

In the present case, the plaintiff argues that, in his response to the City defendants' motion for a summary judgment, he denied the City defendants' affirmative defenses, he denied that his vehicles qualified as derelict, he denied that his vehicles were unlicensed, he challenged the City defendants' notice, he denied that he had not sought to reclaim his vehicles, and he argued that the immunity provisions of the Vehicle Code did not apply because his vehicles were on his own property. We note, however, that the plaintiff did not attach an affidavit or other evidence to support his claims.

While the nonmoving party in a summary judgment motion is not required to prove his case, he must present a factual basis arguably entitling him to a judgment. *Horwitz v.Holabird & Root*, 212 Ill. 2d 1, 8 (2004). "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opposing party cannot rest on its pleadings to create a genuine issue of material fact." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). "Furthermore, where a party moving for a summary judgment files a supporting affidavit containing well-pleaded facts and the party opposing the motion files no counteraffidavit, the material facts set forth in the movant's affidavit stand as admitted. *"Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451, 461 (2001). In addition,

"when the party opposing the summary judgment motion "fails to controvert the proofs offered in support of the motion and the movant's showing of uncontradicted facts would entitle him to judgment as a matter of law, then summary judgment is proper.' [Citation]" *Beelman Truck Co. v. Cosentino*, 253 Ill. App. 3d 420, 426 (1993).

In the present case, when the court granted a summary judgment in favor of the City defendants, it was undisputed that when the vehicles were towed, they were inoperable, they were located on a lot the plaintiff owned in the City of Marion, and the City defendants cause the vehicles to be towed from the plaintiff's lot pursuant to the Ordinance. Goolsby's affidavit indicated that the vehicles were unlicensed at the time, and the plaintiff presented no evidence to support his claim that one of the vehicles was licensed. Based upon the pleadings, affidavits, and other matters of record, the trial court determined that the vehicles were derelict vehicles as defined in the Ordinance, that Goolsby's affidavit demonstrated that the City defendants had fully complied with the terms of the Ordinance in causing the plaintiff's vehicles to be towed, and that no genuine issue of material fact precluded a summary judgment. Because the pleadings and Goolsby's affidavit demonstrate that the plaintiff's vehicles fell under the Ordinance's definition of derelict vehicles and that the City defendants fully complied with the Ordinance in having the plaintiff's vehicles towed and because the plaintiff did not present an affidavit or other evidence to demonstrate otherwise, we find that the trial court properly determined that there was no genuine issue of material fact and that the City defendants were entitled to a judgment as a matter of law. Based on our resolution of this issue, we need not address the City defendants' immunity arguments.

The plaintiff's final argument is that the trial court abused its discretion in denying his motion for leave to amend his complaint. "Generally, the decision whether to grant leave to amend a pleading rests within the sound discretion of the trial court." *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 355 (2002). "Absent abuse of that discretion, its decision will not be disturbed on review." *Clemons*, 202 Ill. 2d at 355. "The factors to be considered in determining whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous opportunities to amend the pleading."

Clemons, 202 Ill. 2d at 355-56.

In the present case, the plaintiff requested that the court allow him to amend his compliant because his withdrawn attorney alleged in the complaint that the acts of Butler and Goolsby were not ministerial acts, but he found that the defendants' actions were ministerial because they were merely enforcing the Ordinance. On appeal, the plaintiff argues that his proposed amendment would have cured the defective pleading, that the defendants would not have been prejudiced or surprised by the proposed amendment was timely, and that he had not been given previous opportunities to amend the pleading. See Clemons, 202 Ill. 2d at 355-56. We agree with the plaintiff that the City defendants would not be prejudiced or surprised by the proposed amendment, that the proposed amendment was timely because before the final judgment it had been raised in the plaintiff's response to the motion for a summary judgment, and that the court had not given the plaintiff previous opportunities to amend the complaint. However, because the proposed amendment (which would have amended the compliant to allege that the acts of Butler and Goolsby were ministerial acts because they were merely enforcing the Ordinance) would not have cured the defective pleading, we find that the trial court did not abuse its discretion in denying the plaintiff's request to amend his complaint. See *Clemons*, 202 Ill. 2d at 355-56.

CONCLUSION

For the foregoing reasons, we affirm the order of the circuit court of Williamson County granting a summary judgment in favor of the City defendants.

Affirmed.

HOPKINS, J., with DONOVAN, P.J., and WELCH, J., concurring.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

September 29, 2005

Ms. Ellen Jenkins Curry
Attorney at Law
302 Public Square
Benton, IL 62812

No. 100478 - George Murray, petitioner, v. Robert Butler, Inv., etc., et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 21, 2005.

ORDINANCE NO. 1759

ARTICLE I: ABANDONED AND DERELICT VEHICLES;

Be it ordained by the city council of the City of Marion, Illinois

SECTION 1. Definitions - For the purposes of this ordinance the following terms shall have the meanings herein ascribed, except as the context may otherwise require:

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a street or highway, whether subject to or exempt from registration, excepting however, bicycles, snowmobiles and devices used exclusively upon stationary rails or tracks. It shall include, for the purposes hereof, any motor vehicle or other vehicle, boat, trailer, or mobile home.

"Abandoned vehicle" means any motor vehicle or other vehicle, or mobile home which is in a state of disrepair, partially dis-mantled, wrecked, or otherwise inoperable so as to render the vehicle in-capable of being driven or used in its condition; or any motor vehicle or other vehicle, boat, trailer, or mobile home which has not been moved or used for seven (7) consecutive days or more and is apparently deserted. The term "abandoned vehicle" as aforesaid shall not be construed to include for the purposes of this ordinance, any such vehicle, boat, trailer or mobile home which is kept in an enclosed building; on the premises of a business enter-prise operated in a lawful place and manner, when necessary to the operation of such business enterprise; or in an appropriate storage place or depository maintained in a lawful place and manner by the City or other party.

"Derelict vehicle" means any inoperable, currently unregistered, discarded motor vehicle, regardless of title, having lost its character as substantial property or left unattended without justification contrary to the public policy expressed in this ordinance. "Inoperable" means any motor vehicle from which, for a period of seven (7) days, the engine, wheels, or other parts have been removed, or on which the engine, wheels, or other parts have been altered, damaged or otherwise so treated that the vehicle is incapable of being driven under its own motor power.

(A) Exceptions: This definition shall not include a motor vehicle which has been rendered temporarily incapable of being driven under its own motor power in order to perform ordinary service or repair operations. Nothing in this Section shall apply to any motor vehicle that is kept within a building when not in use, to operate historic vehicles over twenty-five (25) years of age or to a motor vehicle on the premises of a place of business engaged in wrecking or junking of motor vehicles.

SECTION 2. Public policy - The city council finds that abandoned and derelict vehicles constitute a safety hazard and a public nuisance; are detrimental to the health, safty and welfare of the general public by harboring disease, providing breeding places for vermin, inviting plundering, creating fire hazards, and presenting physical dangers to children and others; produces scenic blights which degrade the environment of the City; represent a resource out of place and an energy loss to the economy, and require local governmental attention in order to assure the expeditious removal of these abandoned and derelict vehicles.

The Marion City Council declares, therefore, that it is the policy of the City to prohibit the abandonment of vehicles and the retention fo derelicts and to enforce such prohibition by law.

SECTION 3. Nuisance declared - The parking of all derelict motor vehicles, or parts thereof, whether on public or private property and in the view of the general public, is hereby declared to be a nuisance. Any person who fails to obey a notice received from the City which states that he is to dispose of any derelict motor vehicle under his control shall commit a nuisance and may be fined not less than twenty-five dollars ($25.00) or a police officer may authorize that the vehicle, or part thereof, shall be removed after seven (7) days from the issuance of this municipal notice.

(A) Automotive vehicles, trucks or trailers of any kind or type without current license shall not be parked or stored on any property other than in completely closed buildings or carports.

SECTION 4. Abandonment of vehicles prohibited - It shall be unlawful to cause or permit any motor vehicle or other vehicle, boat, or trailer, or mobile home, or any part thereof, to be abandoned on private or public

property, including without limitation any street with the City, or otherwise be considered an abandoned or derelict vehicle. Any such abandoned or derelict vehicle is hereby declared a nuisance whether on private or public property.

SECTION 5. Notification to the police department - When any abandoned or derelict vehicle comes into the temporary possession or custody of any person in this City, not the owner of such vehicle, such person shall immediately notify the police department when the vehicle is within the corporate limits of the City of Marion. Upon receipt of such notification, the Chief of Police or his designated representative shall authorize a towing service to remove and take possession of the abandoned, lost, stolen, or unclaimed motor vehicle or other vehicle. The towing service will safely keep the towed vehicle and its contents, maintain a record of the tow until the vehicle is claimed by the owner or any other person legally entitled to possession thereof.

(A) When a vehicle removal from either public or private property is authorized by the Police Department, the owner of the Vehicle will be responsible for all towing costs.

SECTION 6. Disposition of abandoned or derelict vehicles - Any vehicle abandoned or derelict in violation of this ordinance shall be disposed of in accordance with this section or as otherwise allowed by law.

(A) Police responsibilities - When a motor vehicle or other vehicle is authorized to be towed away, as provided herein, the Marion Police Department shall keep and maintain a record of the vehicle towed, listing by color, year of manufacture, manufacture's trade name, manufacturer's series name, body style, Vehicle Identification Number and license plate year and number displayed on the vehicle. The record shall also include the date and hour of tow, location towed from, location towed to, reason for towing and the name of the officer authorizing the tow.

(1) Identifying and tracing vehicle ownership: Upon receiving notification of or otherwise discovering an abandoned or derelict vehicle the police department shall, if it does not already know the identification of the registered owner or other person legally entitled thereto, cause the vehicle and license registration records of the Secretary of State of the State of Illinois, or a foreign state if applicable, to be searched utilizing the vehicle identification number and license plate year and number display-

ed on the vehicle, if any. The owner of such vehicle as disclosed from search shall be the owner of such vehicle for the purposes of the disposition of such vehicle. The police department shall further cause the motor vehicle files o f the Illinois State Police to be searched by a directed communication to the Illinois State Police for stolen or wanted information on the vehicle. When the Illinois State Police files searched with negative results, the information contained in the National Crime Information Center (NCIC) files shall be searched in accordance with State law by the Illinois State Police. When the registered owner or other person legally entitled to the possession of a vehicle cannot be identified from the registration files of the State of Illinois or from the registration files of a foreign state, if applicable, the Marion Police Department shall so notify the Illinois State Police for the purpose of identifying the vehicle owner or other person legally entitled to the possession of the vehicle. The information obtained by the Illinois State Police shall be immediately forwarded to the Marion Police Department.

(2) Notification of owner: When the identity of the owner or other person legally entitled to an abandoned or derelict is known or has been determined in accordance with section 5 (5), above, the chief of police, or his designate, shall cause such owner or other person to be given notice that such vehicle has been determined to be an abandoned or derelict vehicle in violation of this article and that unless such vehicle is removed within seven (7) days from the date such notice is mailed, postage prepaid, by certified mail, the vehicle will be towed and impounded in accordance herewith, and the owner will be charged with having violated his article, The Chief of Police, or his designate, may cause, but is not required to personally serve such notice on such owner or other person, and need not establish whether such notice is actually received if mailed. In those instances where the certified notification specified herein has been returned by the postal authorities to the Marion Police Department due to the addressee having moved, being unknown at the address obtained from the registration records of this State of Illinois, or having refused delivery, the sending of a second certified notice is not required. A copy of such notice shall also be served upon any lien holder if the same has been disclosed by the title search required above. The notice required by this section may be in substantially the following form:

Date:

To: Name
Address

The Marion Police Department has determined that a certain vehicle in your name (or to which you are legally entitled) is abandoned or derelict within the meaning of the abandoned and derelict vehicle regulations of the city of Marion. The vehicle was found and is now located at_____ in the City of Marion, Illinois. It is described as follows:

Year of Manufacture:
Manufacturer's trade name:
Manufacturer's series name:
Body Style:
Color:
Vehicle identification number:
License plate year and number:

In accordance with the abandoned and derelict vehicle regulations, this vehicle will be towed, impounded and disposed of by the Marion Police Department in accordance with the regulations if the vehicle is not removed within seven (7) days from the date of this notice. You will be responsible for all towing costs. Also, you may be charged with violating such regulations.

If you do not wish to retain possession of this vehicle and you hold a clear title to it, the following procedure is suggested:

(1) Contact a towing service of your choice and make your arrangements with them;
(2) On the reverse side of the Certificate of Title, the are marked "Assignment of Title"; fill in name and address of the garage to whom you made your arrangements";
(3) Write your signature on the black line opposite the words "Signature of Seller";
(4) Have the document notarized and mail it to the above towing service;
(5) If you need any assistance with this procedure, please call the Marion Police Department.

If you are not the owner of the described vehicle or have no interest in the vehicle at this time, please contract the Marion Police Department and so advise.

When the identity of the owner or other person legally entitled to an abandoned or derelict vehicle is not known and has been determined in accordance with the provisions hereof, and in addition to the known, the chief of police, or has designate, shall cause a prominent notice to be placed on the abandoned motor vehicle stating that the vehicle has been determined to be abandoned in accordance with the abandoned or derelict vehicle regulations of the city of Marion and that it will be towed and impounded unless removed within seven (7) days from the date the notice was posted. The date the notice is posted shall be endorsed on the notice, the officer posting such notice, and the telephone number of the Marion Police Department at which information may be obtained relative to the notice. The chief of police, or his designate, shall further cause the owner or other party in possession of private property on which the vehicle is located to be informed that the vehicle will be towed and impounded after seven (7) days, unless such vehicle is located on private property of the owner of such vehicle or such private property owner notified the Marion Police Department of such abandoned or derelict vehicle. Such private property owner shall have all rights of review under this article if such private property owner is a person legally entitled to such vehicle. Notice to the owner or party in possession is informational only and not juridictional.

SECTION 7: Review of determination: When a vehicle has been determined to be an abandoned or derelict vehicle within the meaning of this article, the owner thereof or other person legally entitled thereto shall have the right to have such determination reviewed in accordance with this subsection.

(A) Chief of police: Any owner of or other person legally entitled to a vehicle determined to be an abandoned or derelict vehicle within the meaning of this article, may within seven (7) days the notification required under section 4(b) is mailed or personally delivered, as the case may be, file a written request with the chief of police that he review such determination stating the reason or reasons why such vehicle is not an abandoned or derelict vehicle within the meaning of this article. Within seven (7) days of such written request, the chief of police shall review such determination giving the owner or other person an opportunity to personally be heard and present whatever information as such owner or other person considers pertinent. After reviewing such determination, the chief of police shall render a written decision thereon which shall be

promptly mailed, postage prepaid, by certified mail, to such owner or other person, or delivered personally as stated heretofore.

(B) Mayor: If the owner of or other person legally entitled to such vehicles does not agree with the decision of the chief of police after his review, such owner or other person may within seven (7) days after the decision of the chief of police is mailed to such owner or other person, file a written request with the mayor that the mayor review the original determination and the decision or the chief of police stating the reason or reasons why such vehicle is not an abandoned or derelict vehicle within the meaning of this article. Within seven (7) days of such written request, the mayor shall schedule and conduct a hearing to review such determination and such decision. At such hearing, the mayor shall consider pertinent information presented by the Marion Police Department and such owner or other person. The mayor may also personally inspect such vehicle. The parties, personally or through counsel, shall also have the right to cross-examine each other's witnesses. After reviewing such determination and such decision, the mayor shall render a written decision thereon which shall be promptly mailed, postage prepaid, by certified mail, to such owner or other person, or delivered personally as stated heretofor. If such owner or such other person has not been charged with violating this article, the review of the mayor shall be the final determination and such vehicle may then be towed and impounded if found to be an abandoned vehicle. If such owner such other person has been charged with violating this article, then the right of judicial determination shall apply as hereinafter provided.

(C) judicial determination: If the owner of or other person legally entitled to a vehicle determined to be an abandoned or derelict vehicle within the meaning of this article does not agree with the decision of the mayor, and such owner or such other person has been charged with violating this article, such owner or such person may within seven (7) days after the decision of the mayor is mailed to such owner of such other person file a request with the mayor that the vehicle not be towed or impounded pending the disposition of such charge. If such request is filed, such vehicle shall not be towed and impounded until such charge has been disposed of. After such charge is disposed of, finding such owner or other person guilty, such vehicle shall then be towed and impounded unless such nuisance has then been abated.

(D) Stay of towing and impounding: Pending any review of a determination that a vehicle is an abandoned or derelict vehicle within the meaning of this article, any such vehicle shall not be towed or impounded except as is permitted for emergency tows.

SECTION8: Towing and impounding of vehicles: Subject to review of any determination pursuant hereto that a vehicle is an abandoned or derelict vehicle with the meaning of this article, such abandoned and derelict vehicle may be towed and impounded after a waiting period of seven (7) days or more from the date the notification required pursuant to section 6 has been mailed or delivered, as the case may be. The chief of police, or his designate, shall authorized a towing service to remove and take possession of the abandoned vehicle. The towing service shall safely keep the towed vehicle and its contents, maintain a record of the tow until the vehicle is claimed by the owner or any other person legally entitled to possession thereof, or until it is disposed of as provided in this article. When any vehicle is authorized to be towed away, the Marion Police Department shall keep and maintain a record of the vehicle towed, listing the color, hear of manufacture, manufacturer's trade name, manufacture's series name, body style, vehicle identification number, and license plate year and number displayed on the vehicle. The record shall also indicate the date and hour of tow, the location towed from, the location towed to, the reason for towing, and the name of the officer authorizing the tow. A record search of the vehicle shall also be made.

(A) Reclaiming vehicles: At any time before a vehicle is sold at public sale or disposed of as provided in this article, the owner or other person legally entitled to its possession may reclaim the vehicle by presenting to the Marion Police Department proof of ownership or proof of the right of possession of the vehicle. No vehicle shall be released to the owner thereof or other person entitled thereto until and unless such owner or such person has paid all towing and storage fees on account of such vehicle.

(B) Disposal of unclaimed vehicles: Abandoned or derelict vehicles which have been towed or impounded shall be disposed of in accordance with this subsection.

(1) Disposal with notice: Whenever an abandoned or derelict vehicle, seven (7) years of age or newer, remains unclaimed by the registered owner or other person legally entitled to its possession for a period of

thirty (30) days after notice has been given by mail or delivered as provided in section 6, paragraph 2, the Marion Police Department shall cause such vehicle to be sold at public sale to the highest bidder. Notice of the time and the sale shall be posted in a conspicuous place for at least ten (10) days prior to the sale on the premises where the vehicle has been impounded. At least ten (10) days prior to the sale, the Marion Police Department, or the towing service where the vehicle is impounded, shall cause a notice of the time and place of the sale to be sent by certified mail to the registered owner or other person known by the Marion Police Department or towing service to be legally entitled to the possession of such vehicle. Such notice shall contain a complete description of the vehicle to be sold and what steps must be taken by an y legally entitled person to reclaim the vehicle. Whenever an abandoned or derelict vehicle more than seven (7) years of age is towed or impounded, it may be sold as provided above or disposed of as junk only at the discretion of the chief of police, or his designate. A vehicle classified as an antique (25 years of age or older) may also be sold to any person desiring to restore same

(2) Disposal without notice: When the identity of the registered owner or other person legally entitled to the possession of an abandoned or derelict vehicle seven (7) years of age or newer cannot be determined in accordance with Section 6, the vehicle may be sold as provided in Section 6 (1), but without notice of the time and place of the sale being mailed to the registered owner or other person legally entitled to the possession of the vehicle. Whenever an abandoned or derelict vehicle is more than seven years of age and is towed and impounded, it may be sold as provided above or disposed of as junk only at the discretion of the chief of police, or his designate.

(3) Proceeds of sale: When a vehicle located within the city is authorized to be towed, impounded and disposed of as set forth in this article, the proceeds of the public sale or other disposition after the deduction of towing, storage and processing charges shall be deposited in the city's treasury.

(4) Police reports: When a vehicle in the custody of the Marion Police Department is reclaimed by the registered owner or other legally entitled person, or when the vehicle is sold at public sale or otherwise disposed of as provided in this article, a report of the transaction shall be maintained by the Marion Police Department for a period of one (1) year from the date of sale or disposal.

SECTION 9: Emergency tows: Notwithstanding anything in this article to the contrary, when a vehicle is creating a traffic hazard because of its position in relation to a highway, its physical appearance is causing the impeding of traffic, or it otherwise presents a danger to the public health and safety on public or private property, the chief of police, or his designate, may authorize and direct the immediate towing and impounding of such vehicle without notice to the owner or other person legally entitled shall be identified and notified in accordance with this article. The determination may also be reviewed and vehicle disposed of in accordance with this article provided that if it is concluded that such vehicle is not an abandoned or derelict vehicle within the meaning of this article, such vehicles shall be released without charge to the owner thereof or other person legally entitled thereto.

SECTION 10: Immunity: Any police officer, towing service owner, operator or employee shall not be held to answer or be liable for damages in any action brought by the registered owner, former registered owner, or his legal representative, or any other person legally entitled to the possession of a vehicle when the vehicle was processed and sold or disposed of as provided in this article. All necessary parties shall have the full right and authority to enter upon private property for the enforcement of this article when any vehicle is in the view of the general public.

SECTION 11: Not exclusive: The provisions hereof shall be considered in addition to any procedures established, otherwise by law or ordinance for the removal and disposition of abandoned or derelict vehicles.

ARTICLE II: PROPERTY MAINTENANCE

SECTION 1: Multiple vehicles for sale. The offering of two (2) or more motor vehicles for sale at the same time on private property located within a residentially zoned area is prohibited. At no time and under any circumstances is the offering for sale of a derelict or the sale of vehicle parts permitted in open areas on private property upon which it is situated is licensed by the City to permit such sale. For the purpose of this section a "FOR SALE" sign posted upon or adjacent to a motor vehicle constitutes an offering for sale and is prohibited unless specifically allowed herein.

SECTION 2: Enclosure of motor vehicles: Unless otherwise provided herein, all unregistered, inoperable or derelict vehicles shall be kept in a garage in a residential district.

SECTION 3: Dismantling of motor vehicles prohibited: Unless other-

wise provided for herein, no motor vehicle which is in a state of major disassembly, disrepair or which is being stripped or dismantled shall be permitted on any property located within a residential or a non-residential district unless the property is licensed for such use. The major repair or demolition of motor vehicles shall not be permitted in residential areas.

SECTION 4: Unlawful parking of motor vehicles: Al vehicles parked in a residential district shall be parked on a street, a clearly delineated driveway or within a garage. At no time shall a motor vehicle be parked, stored or in any manner be placed on the front, side or rear yards or otherwise allowed to create a nuisance to adjoining property owners by placing the vehicles in areas other than herein provided.

SECTION 5: Commercial vehicles in a residential district: No more than one (1) commercial vehicle shall be parked, stored or housed within a residential district. The commercial vehicle parked, stored or housed within a residential district must be owned by or assigned to the owner of the premises where the vehicle is situated and must be located on the owner's lot in the residential district. The vehicle must not exceed seven feet (7') in height and shall not be a school bus, tractor, trailer, dump truck, front loader, crane, tow truck or similar vehicle. The commercial vehicle shall be parked to the side or rear of a building so as to be screened from view of the public right-of-way as much as possible. For the purpose of this section, a commercial vehicle is a vehicle having been issued a "B" or a "D" license plate by the Secretary of State. All other commercial vehicles having greater than a "D" license plate shall not be parked, stored, or housed within a residential district.

SECTION 6: Recreational vehicles: The provisions of this Code shall not be construed to amend or alter any provisions contained in other Codes or ordinances regulating the parking and/or storing of recreational vehicles.

SECTION 7: Applicability of provisions: All provisions of this Code shall apply to trailers and towable vehicles.

ARTICLE III: VIOLATIONS, PENALTIES AND REMEDIES

SECTION 1: Violations: It shall be unlawful for any person to erect, construct, alter, extend, repair, remove, demolish, use or occupy any structure or equipment regulated by this ordinance when such conduct is contrary to or in conflict with or in violation of any provisions stated herein.

SECTION 2: Penalty: Any person, upon conviction of violating any provisions of this ordinance, shall be fined not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00) for each violation. Any Marion Police Officer is authorized to issue a citation for each day that a violation continues after due notice has been served and each citation shall be deemed a separate and distinct offense.
SECTION 3: Non-Compliance with order: In case any violation order is not promptly complied with, the chief of police may request the city council to direct the city attorney to institute an appropriate action or proceeding in a court of competent jurisdiction to collect the penalties provided for in Section 2 above.

PASSED BY THE COUNCIL OF THE CITY OF MARION THE 27TH DAY OF MARCH, 2000

SIGNED BY THE MAYOR OF THE CITY OF MARION THE 27TH DAY OF MARCH, 2000

ATTEST:

ELIZABETH J. STROBEL, CITY CLERK

ROBERT L. BUTLER, MAYOR

By agreement, an order was entered adding the necessary language for this case to be brought as a Supreme Court Rule 304(a) appeal. C 147. On January 8, 2004. Murray filed a timely notice of appeal.

ARGUMENT

I. MARION CITY ORDINANCE NO. 1759 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS VAGUE. CONTRADICTORY, UNREASONABLE, AND OVERLY BROAD

A. Standard of Review

Murray contends that Ordinance No. 1759 is unconstitutional. In construing a municipal ordinance, the same rules are applied as those which govern the construction of statutes. *City of Chicago v. Morales,* 177 Ill. 2d 440, 447 687 N.E.2d 53, 59, 227 Ill. Dec. 130, 136 (1997), *aff'd,* 527 U.S. 41, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999). The reasonableness of an ordinance is a question of law. City of Collinsville v. Seiber, 82 Ill. App. 3d 719, 724, 403 N.E.2nd 90, 93, 38 Ill. Dec. 75, 78 (5th Dist. 1980). When resolving an issue of statutory construction, the court reviews that ques-tion de novo. *Lulay v. Lulay,* 193 Ill. 2d 455, 465, 739 N.E.2d 521, 527, 250 Ill. Dec. 758, 764 (2000). "The applicability and effect of constitutional provisions, the interpretation of statutes and ordinances, and the evaluation of whether summary judgment should have been allowed in a case all present questions of law," which courts review *de novo. Hawthorne v. Village of Olympia Fields,* 204 Ill. 2d 243, 255, 790 N.E.2d 832, 274 Ill. Dec. 59, 67 (2003).

B. Ordinance No. 1759 Is an Unreasonable Exercise of Police Power

Marion's city Ordinance No. 1759 seeks to regulate abandoned and derelict vehicles, *inter alia*, as safety hazards and public nuisances, detrimental to the health, safety, and welfare of the general public, presenting physical dangers to children and others, producing scenic blights which degrade the environment and adversely affect land values, and requiring local governmental attention in order to assure their expeditious removal. C 101-102, App. A-1 through A-2 Marion has declared that it is the policy of the City to prohibit the abandonment of vehicles and the retention of derelicts and to enforce such prohibition by law. C 102, App. A-2. While its aim is certainly laudable, this lengthy ordinance includes several inconsistencies that make its application unreasonably vague, arbitrary, and capricious. Moreover, it is unnecessary broad in relation to its stated aims.

The essence of the ordinance is contained in its definitions sections. Under the ordinance, an abandoned vehicle includes any motor vehicle "which is in a state of disrepair, partially dismantled, wrecked, or otherwise inoperable so as to render the vehicle incapable of being driven or used in its condition." C 101, App. A-1. Under the same definition, an abandoned vehicle also includes any motor vehicle "which has not been moved or used for seven (7) consecutive days or more and is *apparently deserted.*" Emphasis added. C 101, App. A-1.

Under the same definition section, an abandoned vehicle is defined to exclude any vehicle "which is kept in an enclosed building." C 101, App. A-1. An exception to the derelict vehicle definition states that "nothing in this section shall apply to any motor vehicle that is kept within a building when not in use." C 101, App. A-1 In the nuisance section, section 3, the City declares that the parking of all derelict motor vehicles or parts thereof, whether on public or private property and in view of the general public, is hereby declared to be a nuisance. C 102, App. A-2. That section requires that vehicles "without current license shall not be parked or stored on any property other than in completely closed buildings or carports." C 102, App. A-2.

Under the property maintenance section of the ordinance, enclosure of motor vehicles is required and all unregistered, inoperable, or derelict motor vehicles shall be kept in a garage in a residential district. C 108, App. A-8. However, in subsection 4 of the property maintenance section, the ordinance requires that all vehicles parked in a residential district shall be parked on a street, a clearly delineated driveway, or within a garage. C 108, App. A-8. Under this provision, motor vehicles may not be placed for any reason "on the front, side or rear yards or otherwise allowed to create a nuisance to adjoining property owners by placing the vehicles in areas other than herein provided."

If the vehicle in question is a commercial vehicle, however, and it is owned by or assigned to the owner of the premises, then that vehicle may be parked to the side or rear of the building "so as to be screened from view of the public right-of-way as much as possible." C 108-109, App. A-8 through A-9. An abandoned vehicle also does not include one that is kept on the premises of a business that is operated in a lawful place and manner and if necessary to the operation of that business, or if the vehicle is kept in an appropriate storage place or depository "maintained in a lawful place and manner by the City or other party." C 101, App. A-1.

If a person is trying to figure out how to legally park a vehicle on his own property in Marion, he or she cannot possible know what to do. Not everyone has a fully-enlosed garage on their property. If the vehicle is on your own property, is that an "appropriate storage place or depository maintained in a lawful place and manner?"

The City has declared that its public policy is to prevent people from seeing derelict vehicles. C 102, App. A-2. If your vehicle is abandoned rather than derelict, can others see it without causing a viola-

tion of Ordinance No. 1759? If your goal is to properly maintain your property under ordinance NO. 1759, then you could be in violation of the ordinance if you kept your derelict motor vehicle in a residential district in anything other than a garage. C 108, App. A-8. However, the next subsection informs us that "[a]ll vehicles parked in a residential district shall be parked on a street, a clearly delineated driveway, or within a garage." C 108, App. A-8. Under the same provision, no vehicles may be place for any reason on any portion of your yard, unless it is a commercial vehicle. Are you properly maintaining your property if you have your vehicle sitting in your driveway for more that seven days? What about under a carport?

The point is, given the numerous inconsistencies in the ordinance, a person cannot reasonably ascertain how Ordinance No. 1759 applies to varying circumstances. The level of uncertainty and number of internal contradictions renders the ordinance unconstitutionally vague. City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859, 144 L.Ed2d 67, _____(1999) (a law fails to meet the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits).

In addition to the towing and disposal privileges granted to the City under this ordinance, the City has also authorized itself to fine any person in violation of any provision of the ordinance "not less than twenty-five dollars ($25) nor more than five hundred dollars ($500) for each violation." C 109, App. A-9. The fine provisions allow any Marion police officer to issue a citation for each day that a violation continues"after notice, such that each citation is a separate and distinct offense." C 109, App. A-9.

Therefore, if the City determines that you have violated the ordinance, and that the violations have gone on for 10 days, then you could be fined between $250 and $5,000 for doing something as simple as leaving your brand new Mercedes in your driveway for 10 consecutive days. Now, it is probably unlikely that Marion City officials would choose to enforce the ordinance against the Mercedes owner, but under the terms of the ordinance, there is nothing to stop them from enforcing it under those circumstances. An ordinance or statute that invites capricious and arbitrary application is unconstitutional. Morales, 57 U.S. at 56, 119 S. Ct. at 1859.

Murray contends that Ordinance No. 1759 is overly broad in rela-

tion to its stated purpose, that the inconsistencies in the ordinance allow for an arbitrary and capricious application, and due to its vagueness, that the ordinance is not a reasonable exercise of police power. Although an ordinance is presumptively valid, it must bear a reasonable and substantial relation to public health, safety, or general welfare, taking into consideration its objective and all existing conditions and circumstances, and it must not be unduly oppressive on individuals. City of *Collinsville* v. Seiber, 82 Ill. App. 3d 719,723,403 N.E.2d 90, 93, 38 Ill. Dec. 75, 78)5th Dist. 1980). "An ordinance is overboard if it offends the constitutional principle 'that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'." *City of Collinsville*, 82 Ill. App. 3d at 724, 403 N.E.2d at 93, 38 Ill. Dec. at 78.

Ordinance No. 1759 is an exercise of police power, which is an attribute of sovereignty in every government b which it may protec lives, health, morals, and general welfare. *Sherman-reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 326, 265 N.E.2d 640, 642 (1970). "To be a valid exercise of the police power, the enactment of legislature must bear a reasonable relation to the public interest sought to be protected, and the means adopted must be reasonable to accomplish such objective." *Sherman*-Reynolds, 47 Ill. 2d at 327, 265 N.E.2d at 642.

The first problem with Ordinance No. 1759 is the inconsistency previously pointed out. When reading the ordinance and trying to determine how it applies in various circumstances, the answers are impossible to determine. The answers to those questions, however, are very important to owners of real property in the City of Marion. Certainly, those who own real property in the City of Marion have an interest in using their property as they see fit without unreasonable interference from the government. *Village of Lake Villa v. Stokovich*, 2004 WL 335172 (Ill. S. Ct. 2004). Just as certainly, the City of Marion, as a local governmental entity, has a substantial interest in preventing nuisances and in protecting the public health and safety.

However, the numerous inconsistencies of Ordinance No. 1759 make it overly broad for accomplishing the City's legitimate purposes. If a property owner in Marion want to acquire an inoperable antique vehicle for restoration, it appears that the ordinance would prohibit that unless the property owner has an enclosed building within which to restore that

vehicle. Similarly, any motor vehicle, regardless of whether it is in great shape or totally inoperable, may be considered an abandoned vehicle if it has not been moved or used for seven consecutive days if the City officials determine that is "apparently deserted." C 101, App. A-1. However, if the vehicle qualifies as abandoned, it may be kept in an enclosed building on the premises of a lawful business if necessary to the operation of that business, or in an appropriate storage place or depository maintained in a lawful place and manner by the City or other party. C 101, App. A-1. Murray maintains that this final exception to the abandoned vehicle definition is so vague as to be incomprehensible. That exception also seems to conflict with numerous other provisions of the ordinance. In other words, Murray felt that he had placed his two antique vehicles in an appropriate storage place or depository because they were maintained in a lawful place - on his own property. If that exception does not apply under these circumstances, when and how would it apply?

Under the abandoned vehicle definition, depending upon how it is interpreted, a person who has been taken ill and who has a perfectly good, operable car or truck parked in a carport at his lawfully owned residence, runs the risk of having that vehicle towed in his illness causes him to leave the vehicle in one spot for seven consecutive days and if he also fails for any reason to respond to the City's notice within seven days after the notice is mailed by the City. There is absolutely nothing in the language of Ordinance No. 1759 to prevent such a scenario from occurring. Therefore, when the ordinance is read as a whole, it is vague, ambiguous, contradictory, and unreasonably overboard.

In the trial court, the City defendants claimed that Murray had been deprived of neither procedural nor substantive due process. C 82. The City defendants cited two cases for the proposition that due process is not violated when a government representative allegedly deprives an individual of his property if an adequate post-deprivation remedy is provided under state or local law. *Lee v. City of Chicago*, 330 F.3d 456, (7th Cir. 2003) and *Gable v. City of Chicago*, 296 F.3d 531 (7th Cir. 2002). Murray pointed out in his response to the motion for summary judgment that both of these cases are distinguishable in that they involve cars parked on public highways and claims under 42 U.S.C.§1983. C 124.

Additionally, whether adequate post-deprivation remedies are provided is not relevant unless the court first determines that the ordinance bears a reasonable relation to the public interest that is sought to be

protected and that the means adopted by the government body are reasonable to accomplish those objectives. *Sherman-Reynolds*, 47 Ill. 2d at 327, 265 N.E. 2d at 642. "When the basis of the constitutional challenge is an alleged violation of the due process clauses of the state or federal constitutions, the court will ordinarily apply the rational basis test, under which the statue will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor discriminatory." *Village of Lake Villa*, slip op. at p. 10. The application of the rational basis test requires the court to consider (1) whether the public interest the statute is intended to serve is a legitimate interest, (2) whether the statute bears a rational relationship to that interest, and (3) whether the method chosen by the legislature to protect or further the interest is reasonable. *Village of Lake Villa*, slip op. at p. 11.

In the case at bar Murray concedes that first prong of the rational basis test; the public interest Ordinance No. 1759 is intended to serve is clearly a legitimate interest. It is the second and third prongs of the rational basis test that are problematic. First, it is the overly broad and contradictory nature of the ordinance that fails to bear a rational relationship to the City's interest in abating nuisances and protecting public health and safety. It defies common sense and reasonableness for the City to prohibit property owners from allowing their own vehicles to remain in one spot on their property for seven days regardless of the condition of the vehicle unless that vehicle is inside "an enclosed building." C 101, App. A-1. It is equally unreasonable to prevent property owners in Marion from having any motor vehicle that is inoperable or incapable of being driven or used, unless it is in an enclosed building, regardless of the length of time it has been disabled and regardless of whether that vehicle is licensed and titled. C 101, App. A-1.

The ordinance also fails to bear a rational relationship to its stated public policy due to its numerous inconsistencies. For example, the City declares in section 3 that the parking of all derelict motor vehicles, whether on public or private property and in the view of the general public, is declared to be a nuisance. Under the section, any type of vehicle without current license cannot be stored or parked on property "other than in completely closed buildings or carports." C 102, App. A-2. First, it is unclear what a completely closed carport is. The commonly understood definition of a carport is an open-sided automobile shelter by the side of a building. MERRIAM WEBSTER ONLINE DICTIONARY. Therefore,

the clause "completely closed buildings or carports" must mean that is not a nuisance to have derelict vehicles or parts thereof on your private property if they are in either a completely closed building or an open-sided carport. It defies logic and common sense to allow the residents of Marion to have inoperable, currently unregistered, discarded motor vehicles in an open-sided shelter by the side of a building, where they may be viewed by any passerby, but require registered motor vehicles which are in a "state of disrepair, partially dismantled, wrecked or otherwise inoperable" or any other vehicle, regardless of condition or registration, to be anywhere on a piece of property for more than seven consecutive days unless in "an enclosed building." C 101, App. A-1.

The stated public policy is certainly legitimate as well as lofty. However, it defies logic and common sense to find that derelict vehicles do not cause a scenic blight, degradation to the environment, or threat to the health, safety and welfare abandoned vehicles cause those problems unless kept in an enclosed building.

Ordinance No. 1759 also fails the rational basis test because the method chosen by the Marion City Council to protect and further the stated public policy is not reasonable. Although a rational basis review is highly deferential to the judgments of the legislative bodies such as the Marion City Council, if the ordinance is not rationally related to the legitiment public interest, the law cannot be upheld. *Village of Lake Villa,* slip op. at p. 11.

Given all of the inconsistencies within the ordinance, its overbreadth, and the way that it unreasonably restricts property owners from using their private property as they see fit, the method is clearly not reasonable. Although the City has provided property owners with procedures by which they can challenge the City's determination that a violation exists under this ordinance, it is not reasonable to require property owners to have to defend their property in such a way under the terms of this ordinance. Why should any property owner in Marion be required to move any vehicle that has been sitting on one spot on their lot for seven days?

According to the abandoned vehicle definition, that is exactly what property owners in Marion would have to do or risk the City determining that that vehicle is apparently deserted. That provision of the ordinance applies regardless of the age of the vehicle, its condition, the character of the neighborhood, or the circumstances of the owner. A

vehicle with its doors and windows shut, regardless of where it sits on the owner's property or whether it is currently running, does not constitute a safety hazard or a public nuisance; it is not detrimental to the health, safety, or welfare of the general public; it does not harbor disease or provide a breeding place for vermin; it does not invite plundering, create fire hazards, or prevent physical dangers to children; it does not produce scenic blight which degrades the environment and adversely affects land values and the proper maintenance and continuing development of the City' it does not present a resource out of place and an energy loss to the economy; and it most certainly does not require local governmental attention in order to insure the expeditions removal of that vehicle. C 101-102, App. A-1, A-2.

For all of these reasons, the statutory framework chosen by the Marion City Council is not reasonable and is not rationally related to its stated public policy. Therefore, this Court should hold Marion City Ordinance No. 1759 unconstitutional on its face and reverse the trial court's entry of summary judgment in favor of the City defendants.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT ORDINANCE NO. 1759 APPLIES TO MURRAY

A. Standard of Review

"The applicability and effect of constitutional provisions, the interpretation of statutes and ordinances, and the evaluation of whether summary judgment should have been allowed in a case all present questions of law," which courts review de novo. Hawthorne v. Village of Olympia Fields, 204 Ill. 2d 243, 255, 790 N.E.2d 832, 840, 274 Ill. Dec. 59, 67 (2003).

II. MARION CITY ORDINANCE NO. 1759 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS BOTH ARBITRARY AND UNREASONABLE

The City defendants argue that it is a valid exercise of a City's police powers to "define, prevent and abate nuisances." 65 ILCS 5/11-60-2; *Village of Beckmeyer v. Whelan*, 212 Ill. App. 3d 257,569, N.E.2d 1125, 155 Ill. Dec. 514 (5th Dist. 1991); Appellee brief, p. 16. Although ord

Ordinance No. 1759 was ostensibly enacted pursuant to Marion's police power, it is not a valid exercise of that power because it does not reasonably define, prevent, or abate nuisances.

As more fully developed in Murray's initial brief, the numerous inconsistencies and contradictions in the Ordinance render it an unreasonable means by which to accomplish the City's objectives. The City defendants' claim that the Ordinance was enacted pursuant to a State statute, 65 ILCS 5/11-40-3, and that other courts have upheld similar ordinances does not make the Ordinance, as written, any less arbitrary or unreasonable.

Murray acknowledges that our State legislature has authorized municipalities to enact ordinances to declare inoperable motor vehicles to be a nuisance and to thereby provide procedures whereby those nuisances may be abated. 65 ILCS 5/11-40-3. Nevertheless, the legislature has not authorized the City of Marion to enact an incomprehensible, contradictory, and inconsistent ordinance. Even if an ordinance is a *permissible* exercise of authority by a city, the Court must make the further determination as to whether the ordinance is a *reasonable* exercise of the police power. *City of Collinsville v. Seiber,* 82 Ill. App. 3d 719, 723, 403 N.E.2d 90, 93, 38 Ill. Dec. 75, 78 (5th Dist. 1980).

Additionally, that other cities have enacted nuisance vehicle ordinances that meet constitutional muster has no bearing on whether the language chosen by the City of Marion is arbitrary and unreasonable. Each city's body of ordinances are presumed to be constitutional. *City of Chicago v. Morales,* 177 Ill. 2d 440, 448, 687 N.E.2d 53, 59, 227 Ill. Dec. 130, 136 (1997). In construing those ordinances, the constitutionality must be upheld if the ordinance is reasonably susceptible to such a construction, keeping in mind that the fundamental rule of statutory and ordinance construction is to ascertain and give effect to the true intent and meaning of the lawmakers, looking first to the statutory language, which is always the best indicator of the lawmaker's intent. *Morales,* 177 Ill. 2d at 448, 687 N.E.2d at 59, 227 Ill. Dec. at 136.

"Two facts must be established to sustain the validity of the nuisance ordinance: (1) That the property either *per se* or in its manner of use is a nuisance; and (2) That the interference does not extend beyond what is necessary to correct the evil." *Seiber,* 82 Ill. App. 3d at 724, 403 N.E.2d at 93, 38 Ill. Dec. at 78. In this section of Murray's initial brief, he argued that Marion's interference with his property rights extended beyond what

was necessary to correct the evils. Nothing in the cases city by the City defendants addresses that concern. Indeed, the City defendants' brief does not even mention the cases cited in Murray's initial brief.

Moreover, it is significant that the City defendants resorted to paraphrasing Ordinance No. 1759 rather than quoting from it. Apparently, it is necessary to paraphrase the Ordinance in order to make it comprehensible. By raising this issue, Murray has requested this Court to consider the question of how poorly an ordinance can be drafted before it becomes so incomprehensible that it is no longer a constitutional exercise of the City's police powers. Murray contends that a thorough review of the language used by the City of Marion in Ordinance No. 1759 clearly demonstrates that this Ordinance falls below a necessary standard of reasonableness, constitutional argument due to the procedural posture of this case. Plaintiff appealed the decision of the trial court pursuant to Supreme Court Rule 304(a) from a grant of summary judgment in favor of fewer than all parties. C 147-48. The remaining defendant, Tondini, filed a motion for summary judgment on January 15, 2004, which is similar to the motion for summary judgment granted as to the City defendants. C-154. The motion for summary judgment filed by the remaining defendant is currently pending and undecided in the trial court. If this Court does not grant the petition for leave to appeal and the appellate court's application of the waiver rule is allowed to stand, then the constitutional issue is likely to be raised in the trial court.

Once that issue has been determined in the trial court, regardless of the trial court's ruling, the losing party will then have the right to appeal that decision to the appellate court. In order to avoid the cost and time involved with addressing the constitutional issue on remand and again on appeal, the appellate court should have considered the merits of the constitutional issue raised in Plaintiff's briefs to the appellate court. See Appellant's Brief, pp. 22-35 and Appellant's Reply Brief, pp.3-5.

II. ORDINANCE NO. 1759 IS AN UNREASONABLE EXERCISE OF POLICE POWER

Marion's city Ordinance No. 1759 seeks to regulate abandoned and derelict vehicles, *inter alia*, as safety hazards and public nuisances. C101-102, App. A-1, A-2. Marion has declared that its policy is to prohibit the abandonment of vehicles and the retention of derelicts and to

enforce such prohibition by law. C102, App. A-2. While its aim is certainly laudable, this lengthy ordinance includes several inconsistencies that make its application unreasonably vague, arbitrary, contradictory, and an unreasonable exercise of police power.

The essence of the Ordinance is contained in its definitions sections. However, those definitions do not adequately define the parameters of the Ordinance, but rather, only serve to confuse the issue. C 101-2, C 108-8, App.____. Given the numerous inconsistencies in Ordinance No. 1759, those concerned with the Ordinance's application cannot reasonably ascertain how it applies to varying circumstances. This level of uncertainty and the numerous internal contradictions render the Ordinance unconstitutionally vague. City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67(1999) (a law fails to provide due process if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits).

Additionally, Ordinance No. 1759 is an unreasonable exercise of police power. "To be a valid exercise of the police power, the enactment of the legislature must bear a reasonable relation to the public interest sought to be protected, and the means adopted must be reasonable to accomplish such objective." *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill.2d 323, 326, 265 N.E.2d 640,642 (1970). As written, Ordinance No. 1759 is far too broad to accomplish the City's legitimate purposes.

The test for whether this Ordinance passes constitutional muster is the rational basis test. *Sherman-Reynolds*, 47 Ill. 2d at 327, 265 N.E.2d at 642. Specifically, the statute should be upheld if it "bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor discriminatory." *Stokovich*, 211 Ill.2d at 122, 810 N.E.2d at 24, 284 Ill. Dec. at 371. The application of the rational basis test requires the court to consider (1) whether the public interest the statute is intended to served is a legitimate interest, (2) whether the statute bears a rational relationship to that interest, and (3) whether the method chosen by the legislature to protect or further the interest is reasonable. *Stokovich*, 211 Ill.2d at 125, 810 N.E.2d at 25, 284 Ill. Dec. at 373.

In the case at bar, Plaintiff concedes that first prong of the rational basis test; the public interest Ordinance No. 1759 is intended to serve is clearly legitimate. It is the second and third prongs that are problematic.

First, the overly broad and contradictory nature of the ordinance fails to bear a rational relationship to the City's interest in abating nuis-

ances and protecting public health and safety. It defies common sense and reasonableness for the City to prohibit property owners from allowing their own vehicles to remain in one spot on their property for seven days regardless of the condition of the vehicle unless that vehicle is inside "an enclosed building." C101, App. A-1. It is equally unreasonable to prevent property owners in Marion from having any motor vehicle that is inoperable or incapable of being driven or used, unless it is in an enclosed building, regardless of the length of time it has been disabled and regardless of whether that vehicle is licensed and titled. C101, App. A-1.

Second, the method the City of Marion chose to further its interest in abating vehicular nuisances is not reasonable. In particular, the application of the Ordinance to plaintiff's vehicles is totally unreasonable.

At the time plaintiff's vehicles were towed, the doors were looked and the windows were shut. C 118. Those vehicles, regardless their location or their condition, did not constitute a safety hazard or public nuisance; were not detrimental to the health, safety, or welfare of the general public; did not harbor disease or provide a breeding place for vermin; did not invite plundering, create fire hazards, or prevent physical dangers to children; did not produce scenic blight or degrade the environment and adversely affect land values; did not represent a resource out of place and an energy loss to the economy; and they most certainly did not require local governmental intervention in order to insure their expeditious removal. C 101-102, App. A-1, A-2.

For all of these reasons, the statutory framework chosen by the Marion City Council is not reasonable and is not rationally related to its stated public policy. Therefore, this Court should hold Marion City Ordinance No. 1759 unconstitutional and reverse the trial court's entry of summary judgment in favor of the City defendants.

III. THE APPELLATE COURT IMPROPERLY APPLIED RULES OF STATUTORY CONSTRUCTION TO FIND THAT ORDINANCE NO. 1759 APPLIED TO PLAINTIFF'S VEHICLES

Plaintiff argued in the trial and appellate courts that the Ordinance did not apply to his vehicles. Plaintiff submitted two theories under which the Ordinance would not apply. First, under the abandoned vehicle section, that term is specifically defined to exclude any vehicle which is kept in an appropriate storage place or depository maintained in a lawful place and manner by the City or other party. Plaintiff maintained below

that the vehicles which he stored on his lot were maintained in a lawful place and manner under that exception. C123; Appellant's brief, p. 25. Reply brief, p. 14.

Additionally, plaintiff argued that the Ordinance did not apply because the derelict vehicle definition specifically excluded any motor vehicle "to operate historic vehicles over twenty-five (25) years of age." C123, App. A-1.